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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 212...

A. GUSMER, INC., A CORPORATION,

Petitioner,

v.

JAMES P. McGRANERY, ATTORNEY GENERAL OF THE UNITED STATES, successor to ALIEN PROPERTY CUSTODIAN,

Respondent.

PETITION AND BRIEF FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TO THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner A. Gusmer, Inc., a New Jersey Corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on April 24, 1952 affirming a judgment of the United States District Court for the District of Columbia entered on July 11, 1951.

Summary Statement of the Matter Involved and Basis Upon Which This Court Has Jurisdiction to Review the Judgment in Question

On March 4, 1933, the petitioner purchased from a German business firm known as Marienfelde its formula, rights

for manufacturing a product used in the brewing business, trade-mark and good will, for Canada, United States, Mexico and Cuba (R. 21). To acquire these properties the petitioner paid Marienfelde a lump sum and agreed to make annual payments, known as sales license fees, for a period of thirty years based on sales of the product, after which time no further payments were required (R. 20-27). The petitioner made the required payments to Marienfelde from 1933 to March 31, 1941, on which latter date further payments were blocked by Executive Order 8735, 6 Fed. Register 2897. During that period the petitioner did not file tax returns on such payments nor did it withhold United States income taxes pursuant to Internal Revenue Code, Section 143(b).

After March 31, 1941, the petitioner accrued the license fees to the credit of Marienfelde. In May, 1946, the Alien Property Custodian vested Marienfelde's right to receive the payments thus accrued, then amounting to $55,336.29. Pursuant to the vesting order the petitioner paid $39,628.53 to the Alien Property Custodian and the balance of $15,707.76 to the Internal Revenue Bureau as income taxes on the accruals.

Thereafter petitioner paid $11,066.49 to the Alien Property Custodian as license fees accrued to March 31, 1947, making a total of $50,695.02 paid to the Alien Property Custodian. The Internal Revenue thereupon assessed against petitioner, as withholding agent under I. R. C. Section 143, income taxes on license fees which had been paid to Marienfelde for the period up to March 31, 1941. Petitioner was required to file tax returns and pay such taxes amounting to $13,363.88, with interest of $6,056.53 and $3,340.98 as 25% addition to the tax for delay in filing the returns, under Internal Revenue Code, Section 391, totalling $22,761.39. There is no claim of any criminal or fraudulent act by the petitioner; to the contrary, at the time in question, there was reason to believe that no withholding was required.

After paying these amounts, petitioner filed its claim with the Alien Property Custodian to collect the amount of such payments from the funds which were held under the vesting order, which are ample to pay the claim. The basis of the claim is that Marienfelde is the primary taxpayer and, as between them, petitioner's liability as withholding agent is secondary. Further, Marienfelde, an alien, is unjustly enriched, as it paid no income taxes for the period up to March 31, 1941, and the petitioner is deprived of being made whole by the respondent's refusal to subject Marienfelde's property to payment of the amounts which petitioner had to pay to the Internal Revenue Bureau.

The claim was denied by the Alien Property Custodian. Complaint was filed in the United States District Court for the District of Columbia, which sustained the action of the Alien Property Custodian, and the United States Court of Appeals for the District of Columbia Circuit affirmed. It is to the latter judgment of affirmance that this Petition is directed.

For the foregoing reasons, and pursuant to Section 240(a), Act of February 13, 1925, Chapter 229, 43 Stat. 936, this Court has jurisdiction to grant the Writ and review the judgment in question.

The Joint Appendix filed in the United States Court of Appeals for the District of Columbia Circuit is respectfully made a part hereof by reference.

Statutes Involved

Title 50, U. S. C. Appendix

"SEC. 34 (a) Any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net pro-

ceeds thereof, shall be equitably applied by the Custodian in accordance with the provisions of this section to the payment of debts owed by the person who owned such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian. No debt claim shall be allowed under this section if it was not due and owing at the time of such vesting or transfer, or if it arose from any action or transactions prohibited by or pursuant to this Act and not licensed or otherwise authorized pursuant thereto, or (except in the case of debt claims acquired by the Custodian) if it was at the time of such vesting or transfer due and owing to any person who has since the beginning of the war been convicted of violation of this Act, as amended, sections 1-6 of the Criminal Code (18 U. S. C. 1-6), title I of the Act of June 15, 1917 (ch. 30, 40 Stat. 217), as amended; the Act of April 20, 1918 (ch. 59, 40 Stat. 534), as amended; the Act of June 8, 1934 (ch. 327, 52 Stat. 631), as amended; the Act of January 12, 1938 (ch. 2, 52 Stat. 3); title I, Alien Registration Act, 1940 (ch. 439, 54 Stat. 670); the Act of October 17, 1940 (ch. 897, 54 Stat. 1201); or the Act of June 25, 1942 (ch. 447, 56 Stat. 390). Any defense to the payment of such claims which would have been available to the debtor shall be available to the Custodian, except that the period from and after the beginning of the war shall not be included for the purpose of determining the application of any statute of limitations. Debt claims allowable hereunder shall include only those of citizens of the United States or of the Philippine Islands; those of corporations organized under the laws of the United States or any State, Territory, or possession thereof, or the District of Columbia or the Philippine Islands; those of other natural persons who are and have been since the beginning of the war

residents of the United States and who have not during the war been interned or paroled pursuant to the Alien Enemy Act (50 U. S. C. 21); and those acquired by the Custodian. Legal representatives (whether or not appointed by a court in the United States) or successors in interest by inheritance, devise, bequest, or operation of law of debt claimants, other than persons who would themselves be disqualified hereunder from allowance of a debt claim, shall be eligible for payment to the same extent as their principals or predecessors would have been.

* * * * *

(e) If the aggregate of debt claims filed as prescribed does not exceed the money from which, in accordance with subsection (d) hereof, payment may be made, the Custodian shall pay each claim to the extent allowed, and shall serve by registered mail, on each claimant whose claim is disallowed in whole or in part, a notice of such disallowance. Within sixty days after the date of mailing of the Custodian's determination, any debt claimant whose claim has been disallowed in whole or in part may file in the District Court of the United States for the District of Columbia a complaint for review of such disallowance naming the Custodian as defendant. Such complaint shall be served on the Custodian. The Custodian, within forty-five days after service on him, shall certify and file in said court a transcript of the record of proceedings in the Office of Alien Property Custodian with respect to the claim in question. Upon good cause shown such time may be extended by the court. Such record shall include the claim as filed, such evidence with respect thereto as may have been presented to the Custodian or introduced into the record by him, and the determination of the Custodian with respect thereto, including any findings made by him. The court may, in its discretion, take additional evidence, upon a showing that

such evidence was offered to and excluded by the Custodian, or could not reasonably have been adduced before him or was not available to him. The court shall enter judgment affirming, modifying, or reversing the Custodian's determination, and directing payment in the amount, if any, which it finds due.

Internal Revenue Code

SEC. 143. WITHHOLDING OF TAX AT SOURCE.

* * * * *

(b) Nonresident Aliens.—All persons, in whatever capacity acting, including lessees or mortgagors of real or personal property, fiduciaries, employers, and all officers and employees of the United States, having the control, receipt, custody, disposal, or payment of interest (except interest on deposits with persons carrying on the banking business paid to persons not engaged in business in the United States), dividends, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income (but only to the extent that any of the above items constitutes gross income from sources within the United States), of any nonresident alien indvidual, or of any partnership not engaged in trade or business within the United States and composed in whole or in part of nonresident aliens, shall (except in the cases provided for in subsection (a) of this section and except as otherwise provided in regulations prescribed by the Commissioner under section 215) deduct and withhold from such annual or periodical gains, profits, and income a tax equal to 30 per centum thereof, except that such rate shall be reduced, in the case of a nonresident alien individual a resident of any country in North, Central, or South America, or in the West Indies, or of New-

foundland, to such rate (not less than 5 per centum) as may be provided by treaty with such country: • • •

(c) Return and Payment.—Every person required to deduct and withhold any tax under this section shall, on or before March 15 of each year, make return thereof and pay the tax to the collector designated in section 53(b). Every such person is hereby made liable for such tax and is hereby indemnified against the claims and demands of any person for the amount of any payments made in accordance with the provisions of this section.

SEC. 211. TAX ON NONRESIDENT ALIEN INDIVIDUALS.

(a) No United States Business or Office.—

(1) General rule.—

(A) Imposition of Tax.—There shall be levied, collected, and paid for each taxable year, in lieu of the tax imposed by sections 11 and 12, upon the amount received, by every nonresident alien individual not engaged in trade or business within the United States, from sources within the United States as interest (except interest on deposits with persons carrying on the banking business), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income, a tax of 30 per centum of such amount, except that such rate shall be reduced, in the case of a resident of any country in North, Central, or South America, or in the West Indies, or of Newfoundland, to such rate (not less than 5 per centum) as may be provided by treaty with such country.

SEC. 291. FAILURE TO FILE RETURN.

(a) In case of any failure to make and file return required by this chapter, within the time pre-

scribed by law or prescribed by the Commissioner in pursuance of law, unless it is shown that such failure is due to reasonable cause and not due to wilful neglect, there shall be added to the tax: 5 per centum if the failure is for not more than thirty days with an additional 5 per centum for each additional thirty days or fraction thereof during which such failure continues, not exceeding 25 per centum in the aggregate. The amount so added to any tax shall be collected at the same time and in the same manner and as a part of the tax unless the tax has been paid before the discovery of the neglect, in which case the amount so added shall be collected in the same manner as the tax. The amount added to the tax under this section shall be in lieu of the 25 per centum addition to the tax provided in section 3612(d)(1)."

Questions Presented

1. Is an American citizen who has paid royalties, under the facts and circumstances of this case, to a nonresident German alien, without withholding and paying taxes thereon, and who is later compelled to pay the taxes as withholding agent under Internal Revenue Code, Section 143, and 25% addition under Section 291, entitled to recover the amount of such taxes from the property of the alien as the primary taxpayer?

2. Is an American citizen in such case entitled to recover the amount of taxes thus paid from the property of the alien vested in the Alien Property Custodian and held by the respondent?

3. Is the citizen in such case entitled to have the benefit of the equitable remedy of subrogation to the Government's tax claims which all concede could have been collected from the alien's property vested in the Alien Property Custodian?

Reasons Relied Upon for Allowance of the Writ

1. The Court below has rendered a decision which is in conflict with the decision of the Third Circuit Court of Appeals in *McGrath* v. *Dravo Corporation,* 183 Fed. 2nd 709. We can see no distinction between the legal or equitable principles involved in the two cases.

2. The case presents an important question of interpretation of the Trading with the Enemy Act, as amended, Title 50 U. S. C., Appendix, Sections 34(a) and (e) in connection with Internal Revenue Code, sections 143(b) and (c) and 211(a)(1)(A) as amended 50 U. S. C. Sections 2001, *et seq.* to the facts of this case. None of these questions has been, but, we believe should be, settled by this Court.

3. The effect of decision of the Court of Appeals is that a withholding agent, who pays taxes on royalties under statutory compulsion, has no greater equity in the vested funds than has the alien recipient of the income who was the prior owner of the vested funds. Under this theory the alien enemy is unjustly enriched at the expense of withholding agent, an American citizen.

4. The holding of the Court of Appeals that the petitioner is barred from recovery because it failed to comply with certain statutory requirements (which at the time seemed inapplicable, and which were not determined to be applicable until the decision of this Court in 1949 in *Commissioner* v. *Wodehouse,* 337 U. S. 369), departs so far from the decisions and settled law as to warrant the granting of this writ.

Wherefore, it is respectfully prayed that a Writ of Certiorari issue out of and under the seal of this Court directed to the United States Court of Appeals for the

District of Columbia Circuit, commanding that Court to certify and send to this Court for its review a transcript of the record and proceedings in the case at Bar; that the judgment of the U. S. Court of Appeals for the District of Columbia Circuit may be reversed; and, that such other and further relief may be granted as this Honorable Court may deem just and proper.

And your petitioner will ever pray.

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BRIEF FOR THE PETITIONER

Opinion Below

The Opinion of the Court below is not reported; a copy is part of the record herein at page 59.

Jurisdiction

The jurisdiction of the Court is invoked under the Act of February 13, 1925, Chapter 229, 43 Stat. 936, Sec. 240(a).

Statement of the Case

A concise statement of the case containing all that is material to the consideration of the questions presented is contained in the annexed Petition for Writ of Certiorari at pages 1-3.

Specification of Errors

1. The Court below erred in holding in this case that petitioner, having paid royalties in the form of license fees to a non-resident alien without withholding and paying taxes thereon, is not entitled to recover the amount of such taxes and interest, which it was later compelled to pay to the Bureau of Internal Revenue, from the property of the alien vested by Alien Property Custodian.

2. The Court below erred in holding that the petitioner is not entitled to the benefit of the equitable doctrine of subrogation.

Summary of Argument

1. The alien's property, vested in the Custodian, was subject primarily to payment of its debts, including income taxes due and owing at the time of vesting.

2. As between the alien and petitioner, the alien was the primary taxpayer and, having received the full income without deduction of taxes, was unjustly enriched at the expense of petitioner when petitioner was later compelled to pay the taxes.

3. Petitioner on paying the taxes was subrogated by operation of law to the Government's tax claims, with the right to enforce them as debts due and owing prior to the vesting.

4. Petitioner's failure to file the returns and pay the taxes within the times required by statute did not deprive it of such equitable relief.

I

Marienfelde's property, vested in the Custodian, was subject primarily to payment of its debts, including income taxes due and owing at the time of vesting.

Title 50, U. S. C. Appendix, Section 34(a), provides:

> "Any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof shall be equitably applied by the Custodian in accordance with the provisions of this section to the payment of debts owed by the person who owned such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian. No debt claim shall be allowed under this section if it was not due and owing at the time of such vesting or transfer."

It was conceded that the Government could have collected the taxes from the vested funds. The Court of Appeals said:

> "* * * True, the United States might have resorted to the vested funds, rather than to plaintiff, because those funds were not relieved of the alien's tax liability by reason of the vesting, Section 36(a), *supra.* * * *"

The Tax Collector, therefore, had the choice whether to collect the taxes from the vested property or from petitioner. According to the Court's decision, that choice would determine the ultimate liability.

II

As between Marienfelde and petitioner, Marienfelde was the primary taxpayer and, having received the full income without deduction of taxes, was unjustly enriched at the expense of petitioner when petitioner was later compelled to pay the taxes

Internal Revenue Code Sections 11 and 12 contain the general provisions for imposing income taxes on "every individual" at a graduated scale of rates. Then, "in lieu of the tax imposed by Sections 11 and 12", Section 211 imposes income taxes against non-resident alien individuals not engaged in trade or business within the United States upon amounts received by them from sources within the United States as interest, dividends, rents, salaries, etc.

The tax on the non-resident alien is, therefore, an income tax imposed on him, just as are the taxes under Sections 11 and 12 on individuals generally.

There is nothing in these taxing provisions which imposes liability on the person who pays the income. Such liability arises under Internal Revenue Code, Section 143, "Withholding of tax at the source". That section provides in subdivision (a) for withholding amounts from interest payable on tax-free covenant bonds to all persons, residents and non-residents. Next, in subdivision (b), it provides for deducting and withholding the tax on certain amounts payable to non-resident aliens. Then, in subdivision (c), it provides that every person required to deduct and withhold any tax shall make a return and pay the tax, and shall be liable for the tax, with indemnity against the claims and demands of any person. Such person is expressly designated as the "withholding agent".

Section 143 provides merely a convenient method of collecting the tax at the source, which has been extended in Section 1622 to salaries, wages and other remuneration paid to employees in the United States.

Such withholding provisions were referred to in *Commissioner* v. *Wodehouse*, 337 U. S. 369, 381, as a "mechanism of collection"; and in *Estate of Alexander Marton*, 47 B. T. A. 184, 187, it was stated:

> "Undoubtedly the withholding provisions of the Revenue Acts of 1934 and 1936 are to *facilitate administratively the collection of the tax. But these provisions do not impose the tax.* * * *" (Emphasis ours.)

In *Bank of America* v. *Collector*, 138 F. (2d) 7 (C. C. A. 4), at page 8, the Court used the term "primary taxpayer" to distinguish the recipient of the income from the withholding agent.

There are not two taxes, but only one. The liability imposed on the withholding agent is not for *his* tax, but for a tax on the income of the recipient. It follows that, when the full income has been paid without deduction of tax and the withholding agent has later been compelled to pay, the recipient of the income has been unjustly enriched.

This was the decision of the Court of Appeals for the Third Circuit in *McGrath* v. *Dravo Corp.*, 183 F. (2d) 709, with which the decision in the present case is fundamentally in conflict.

In that case, Dravo Corporation paid royalties to a German alien during the pre-war period and, through inadvertance, failed to deduct taxes or to file withholding returns. When Dravo was later compelled to pay the taxes on the pre-war royalties it charged them against subsequently accrued indebtedness to the alien. The Custodian then vested the alien's property and sued Dravo to recover such indebtedness. The Court of Appeals upheld Dravo's claim to offset the amount of the taxes which it had paid on the pre-war royalties on the ground of

unjust enrichment. Such offset depended essentially on a right to equitable restitution from the alien's property. The Court said, 183 F. (2d), at pages 712-713:

> "• • • The question as to whether or not the Attorney General should recover from Dravo the amount here sought is a federal question and the federal law must govern it. Though we think it must be conceded that United States District Courts may apply the doctrine of unjust enrichment, *ex aequo et bono*, in order to prevent injustice, we must state that we can find no federal case in point. We do not think, however, that the federal law would differ greatly from that of the States in this connection. Cf. E. F. Drew & Co. v. Southern Grocery Stores, Del. 1935, 7 W. W. Harr. 356, 183 A. 511. The cited case suggests an analogy, even if remote. We think it is manifest, however, that the Attorney General, *vice* the Custodian, must stand in Kort's shoes. It can be pointed out, of course, that if Dravo had fulfilled the requirements of Section 143 of the Internal Revenue Code and had not, however, inadvertently, forwarded the royalties to Kort without withholding the tax, the sum here sought would have come into the hands of the Custodian under the vesting order. But the short answer to the Attorney General's assertion is that Kort's and Dravo's rights in respect to each other were settled before the vesting order was made. In our opinion Kort would not have had the standing to maintain a suit against Dravo to recover from it the amount of royalty which it had off-set against the tax. Since the right of the Attorney General to maintain a suit for recovery is no better than Kort's, we are of the opinion that the Attorney General cannot recover."

The only difference in the present case is that here the taxes were paid *after* the vesting, and the claim is asserted against the vested property. But the statute, 50 U. S. C.

App., Sec. 34(a), is explicit that any property vested in the Custodian "shall be equitably applied by the Custodian * * * to the payment of debts owed by the person who owned such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian".

This provision of the statute disposes also of the point made in the Court below that the vested funds are to be devoted to a public purpose. The alien's debts must first be paid before the funds are available for any such purpose.

III

Petitioner on paying the taxes was subrogated by operation of law to the Government's tax claims, with the right to enforce them as debts due and owing prior to the vesting.

This follows as a matter of law from the right to restitution because of unjust enrichment.

Concededly, Marienfelde's vested property was liable for the taxes. That liability was not discharged when the Tax Collector elected to collect from petitioner as withholding agent. There is a clear case for subrogation.

> *American Surety Co.* v. *Bethlehem Nat. Bk.*, 314 U. S. 314, 317:
>
> "Among the oldest of these doctrines is the rule of subrogation whereby 'one who has been compelled to pay a debt which ought to have been paid by another is entitled to exercise all the remedies which the creditor possessed against the other'. Sheldon, subrogation (2d ed.), Sec. 11; see *Hampton* v. *Phipps*, 108 U. S. 260, 263; *Hodgson* v. *Shaw*, 3 Myl. & K. 183, 191; *Hayes* v. *Ward*, 4 Johns Ch. 123, 130."

Title Guarantee and Trust Co. v. *Haven,* 196 N. Y. 487, 495:

"These cases suffice to show that there is nothing in the nature of a lien for taxes or assessments or in the fact that such lien exists in favor of a sovereign taxing power to prevent the application of the equitable doctrine of subrogation when justice demands it."

In re Harr, 319 Pa. 193, 179 A. 725;
Cuesta Rey & Co. v. *Newson,* 102 Fla. 853; 136 So. 551;
Camden v. *Fink Coal & Coke Co.,* 106 W. Va. 312, 145 S. E. 575;
Restatement of the Law of Restitution, Sec. 162, comment "f", p. 658.

Subrogation carries with it all the rights of the original owner as of the date the claim arose.

Prairie State Bank v. *United States,* 164 U. S. 227, 232.

As permitted by Sec. 34(a), Petition, p. 5, it makes petitioner the successor to the Government's tax claim "by operation of law".

Aetna Casualty & Surety Co. v. *United States,* 170 F. (2d) 469 (C. C. A. 2);
Restatement of the Law of Restitution, Sec. 162, comment "h", p. 661.

Synthetic Patents Co. v. *Sutherland,* 22 F. (2d) 491, was cited by the Court below and much relied on by respondent against the proposition that paying the taxes gave petitioner a creditor status that related back prior to the vesting. That case was decided under the statute in effect immediately after World War I. In the years 1913 to

1917 an American company made royalty payments to nonresident Germans, who were also its stockholders, without deducting income taxes. In 1919 the company, as withholding agent, was compelled to pay the taxes and then made claim for reimbursement from vested funds held as the proceeds of sale of the Germans' stock in the company. The Trading with the Enemy Act, 50 U. S. C., Appendix 9(e), then in effect, provided that a debt should not be allowed "unless it was owing to and *owned by* the claimant prior to October 6, 1917". This precluded a claim based on paying the taxes on March 6, 1919, because the claimant was not the owner prior to October 6, 1917. Therefore, as stated by the Court, the theory of the complaint was that the Germans became, each time they received a payment, indebted to the American company for the amount of the taxes due the Government. The Court continued (p. 493):

> "* * * It will be noted that the action is not based upon the theory of recovering for a debt due by reason of the payment of March 6, 1919, but to recover the amount of the taxes accruing on said remittance as of the date on which each remittance went forward."

As each remittance went forward, both parties were indebted to the Government for the unpaid taxes, so that the Court correctly held that, at that stage, no cause of action had accrued to the American company; it did not become the "owner" of the claim, even by subrogation, until it paid the taxes two years after the cut-off date.

Under the present statute, the claim must be "due and owing" at the time of vesting; it need not be "owned" by the claimant at that time; so that subrogation to the Government's tax claim, which was "due and owing" at the time of vesting, meets the requirements.

IV

Petitioner's failure to file the returns and pay the taxes within the times required by statute did not deprive it of such equitable relief.

Such violation of statute was the ground on which the Court below denied equitable relief to the petitioner. It presents the question of general interest whether such violation of statute, without a finding of crime or fraud or unconscionable conduct, should bar a withholding agent from recovery against the recipient of the full income.

No case was cited by the Court below and no case has been found by us which would bar equitable relief for unjust enrichment solely on the ground of violation of a statute not involving a crime or some element of moral turpitude.[1]

The *Restatement of the Law of Restitution*, Section 140, states the law as follows:

> "A person may be prevented from obtaining restitution for a benefit because of his criminal or other wrongful conduct in connection with the transaction on which his claim is based."

In comment "b", the factors are stated as follows (p. 563):

> "* * * Among the factors which are or may be of importance in determining whether restitution will be granted are the following: (1) whether the complainant's conduct involved serious moral turpitude;

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[1] *Washington Mechanics' Savings Bk.* v. *District T. Ins. Co.*, 65 F. 2d 827, cited by the Court below, is not remotely concerned with the present case. It had to do with the rights of a bonding company, which had insured the employees of the drawer of a check, to recover by subrogation from one of the banks which had paid the check on a forged endorsement.

> (2) the closeness of the wrongful conduct to the transaction; (3) whether the complainant was in a superior or subservient position to the recipient; (4) how great a forfeiture would ensue from a failure to give relief; (5) whether a denial of relief would tend to discourage similar illegal transactions."

None of these factors exists in the present case where there was merely an unexcused failure to comply with the statute.

In *Adams* v. *Young*, 200 Mass. 588, one who purchased a stock in trade in bulk in violation of the statute, without any actual fraud, was allowed the remedy of subrogation, that is, to stand in the place of creditors whose demands he paid as the purchase price of the property, although he was guilty of constructive fraud. The court said (p. 592):

> "The merely constructive fraud of a purchaser will not prevent him from protection in this manner, if he has not himself actively participated in the fraud. There are many cases to this effect."

Where the wrong committed in violating the statute is merely *malum prohibitum* and does not endanger health or morals, the law does not impose the additional punishment of forfeiture, to the unjust enrichment of another person.

Rosasco Creameries, Inc. v. *Cohen*, 276 N. Y. 274.

In *McGrath* v. *Dravo Corporation*, 183 F. 2d 709, where relief was granted, the court referred to the failure to comply with the statute as "inadvertent" (above, p. 16).

In the present case, there is no evidence as to why petitioner failed to withhold and pay the taxes, but at the time, under the statute and regulations as confirmed by

all the decisions until *Commissioner* v. *Wodehouse*, 337 U. S. 369, in 1949, it seemed clear that the payments to Marienfelde, being proceeds of the sale of property, were not subject to the withholding requirements.

The agreement of March 4, 1933, under which the petitioner made the payments to Marienfelde, amounts to an absolute sale of the trademarks, good will and formulae in this territory, transferring the ownership to petitioner. The agreement first recites the registration numbers of the Mammut trademarks in Germany, the United States, Canada and Mexico (R. 20-21). In Article 2, Marienfelde "grants" petitioner the right to manufacture "Mammut Coating Materials and Mammut Pitch" for the United States, Canada, Mexico and Cuba (R. 21). In Article 2, Marienfelde "grants" petitioner the rights in the trademarks and "assigns" its good will for the four countries and "consents to and applies for the assignment of the Mammut trademarks registered for it in the four countries mentioned" (R. 21). Article 2 concludes that "for the granting of the trademarks, A. Gusmer, Inc. pays to Marienfelde a lump sum of $3,000". In Article 3, Marienfelde "gives" petitioner the formulae, and in Article 5 petitioner agrees to pay Marienfelde sales license fees based on the amount of the products sold for a period of 30 years, after which no license fee is payable (R. 23-25).

This has all the earmarks of a sale and transfer to petitioner of the property rights in this territory.[2]

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[2] It is significant that the Custodian did not vest the trademarks, good will or formulae, but only the rights created in Marienfelde by virtue of the agreement of March 4, 1933, and the supplementary agreements, relating to the Mammut trademark, U. S. No. 74,854 (R. 6, par. (b)). The trademark, good will and formulae still remain in the ownership of petitioner. The trademark described in par. 5(a) of the vesting order (R. 5-6), obtained by Marienfelde in 1936 after the making of these agreements, had no relation to the subject matter of these agreements.

It has long been settled that provision for periodical payments under an agreement for the purchase of property, based on sales or production or profits in the use of the property, does not modify the nature of the transaction as a sale, so that the profit to the seller from such payments is capital gain rather than ordinary income.

Commissioner v. *Hopkinson*, 126 F. 2d 406, 410 (C. C. A. 2, 1942);
Burnet v. *Logan*, 283 U. S. 404 (1931);
Littlefield v. *Perry*, 88 U. S. 205, 220 (1874);
Rude v. *Westcott*, 130 U. S. 152 (1889);
Helvering v. *Elbe Oil Land Co.*, 303 U. S. 372, 374 (1938).

Prior to the 1949 decision of this Court in *Commissioner* v. *Wodehouse*, 337 U. S. 369, it seemed equally well settled that capital gains in whatever form derived by a non-resident alien from the sale of property in the United States, including royalties, were not subject to withholding.

Commissioner v. *Celanese Corp.*, 140 F. (2d) 339 (C. C. A., D. C., 1944);
George James Nicholson, 3 T. C. 596 (1944);
Kimble Glass Co., 9 T. C. 183 (1947).

That there was ample basis for such view of the law appears from much of the material in the opinion of this Court in the *Wodehouse* case.

The Treasury Decision made in 1933, quoted in 337 U. S. at pages 384-385, footnote 8, which held royalties taxable, did so because "the conclusion is obvious that the grant is a license and not a sale".

Prior to the Revenue Act of 1936, all of the income of a non-resident alien was taxable, but the regulations under Section 143(b) did not require withholding with respect to income derived from the sale of property in the United

States. The regulations substantially in effect since 1924 (p. 391) were as follows (p. 382):

> "Only fixed or determinable annual or periodical income is subject to withholding. The Act specifically includes in such income, interest, rent, salaries, wages, premiums, annuities, compensations, remunerations, and emoluments. *But other kinds of income are included, as, for instance, royalties.*
>
> "* * * *The income derived from the sale in the United States of property, whether real or personal, is not fixed or determinable annual or periodical income.*" (Emphasis by this Court.)

Precisely the same quotation is found in *Kimble Glass Co.*, 9 T. C. 183, at p. 188, footnote 1, in which it was held that the royalty payments were the purchase price of patents and, therefore, not subject to withholding. The Tax Court said (p. 190):

> "The fact that, in addition to the fixed payments, other payments based on a percentage of profits or on production were called for under the contracts does not change the result. It is not infrequent that patents are sold under such terms, or even where the entire consideration is based on a percentage of income during the life of the patents. See for example, *Associated Patentees, Inc.*, 4 T. C. 979; *Littlefield* v. *Perry*, 21 Wall. 205; and the *Celanese* case, *supra*. And in such cases the percentage payments, though in many respects like royalties payable under a license, are no less payments of purchase price for the patent than are fixed or lump sums."

The Congressional Committee, commenting on the Revenue Act of 1936 when pending in Congress, said (337 U. S., at p. 389, footnote 12):

> "* * * In the case of a foreign corporation not engaged in trade or business within the United States

and not having an office or place of business therein, it is proposed to levy a flat rate of tax of 15 percent on the gross income of such corporation from interest, dividends, rents, salaries, wages, and *other fixed and determinable income* (*not including capital gains*). * * *" (Emphasis by the Court.)

It seemed a reasonable interpretation of this language that all of the kinds of income mentioned were subject to the qualification, "(not including capital gains)".

The lower Court decisions in the *Wodehouse* case in 8 T. C. 637 and 166 F. (2d) 986, were not to the contrary. The case involved lump sum payments to an alien author for serial or book rights in stories which he copyrighted in the United States, retaining for himself ownership of the copyrights except for the rights transferred. In the lower courts the question was the divisibility of the copyrights—if less than the whole bundle of rights were granted, could it be a sale or was it a mere license?

The Tax Court in 8 T. C. 637, 653, followed *Sax Rohmer*, 5 T. C. 183, aff'd 153 F. (2d) 61; certiorari denied, 328 U. S. 862. *Sax Rohmer* was decided on the ground that where a copyright owner transfers "substantially less than the entire 'bundle of rights' conferred by the copyright, then payment therefor, whether in one sum or in several payments, constitutes royalties within the meaning of Section 211(a)(1)(A)". (*Rohmer* v. *Commissioner*, 153 F. (2d) 61, 63, C. C. A. 2.) When it was argued that the Court was bound to follow its earlier decision in *General Aniline & Film Corp.* v. *Commissioner*, 139 F. (2d) 759, which involved denial of the application of the withholding provision to a lump sum payment, the Court said (p. 64):

"* * * But there we held that the transfer was such that the transferee probably acquired title to the patents; at any rate, we considered that virtually all the patentee's rights passed to the transferee, so

> that *there was a sale. It was that fact, and not the fact that* (as to one of the contracts) *a lump sum payment was made,* which led to our conclusion that a sale had occurred and therefore no withholding was required. Cf. Commissioner v. Celanese Corporation, 78 U. S. App. D. C. 292, 140 F. 2d 339. * * *" (Emphasis ours.)

The Fourth Circuit Court of Appeals in the *Wodehouse* case placed its reversal of the Tax Court on two grounds, that it was a sale, and therefore not subject to tax, and that the lump sum payments did not answer the description of "annual or periodical gains" (166 F. (2d) 986, 991).

This Court, however, put aside the narrow question of divisibility and laid down the broad general rule that it was not intended by Congress to exempt non-resident aliens from such readily collectible taxes, as this would discriminate against resident citizens of the United States "who would be required to pay their regular income tax on such income, if treated as royalties within the meaning of our gross income provisions, or at least to pay a tax upon them *as capital gains, if treated as income from sale of capital* within the meaning of our capital gains provisions" (337 U. S., at p. 391; emphasis ours). The Court made no distinction between a lump sum payment and periodical payments based on production or sales or profits.

Mr. Justice Frankfurter in his dissent, joined in by Mr. Justice Murphy and Mr. Justice Jackson, asserted that such decision ignored the intrinsic character of "royalties", whether proceeds of sale or recurring income from a license, saying (p. 409):

> "* * * Here we are dealing with legislation that is precise. Yet the Court chooses not to give it effect and it does so on the basis of fiscal considerations which Congress, by what it enacted, chose not to write into law."

Whatever the considerations that led this Court to the conclusion that all royalties were taxable and subject to withholding, whether constituting ordinary income or capital gains to the non-resident alien, the consequence to the petitioner is that, having made the full payments to Marienfelde without withholding the taxes for the period 1933-1941 when it was the reasonable interpretation of the law that no withholding was required, and having later been compelled to pay Marienfelde's taxes on such payments, it has been prevented by *Commissioner* v. *Wodehouse* from pursuing the Collector for refund of the taxes, and now, by the decision in the present case, it is barred from recovering the taxes from Marienfelde's vested property on the ground that its failure to withhold and pay the taxes in 1933-1941 violated the statute.

The question of general interest, of course, is whether such a violation of the statute, not involving a crime or fraud or unconscionable conduct, is a bar to equitable relief by the withholding agent against the recipient of the income. The circumstances above set forth in regard to the generally accepted interpretation of the law in 1933-1941, as confirmed by the lower courts' decisions, and the final determination of the law to the contrary by this Court in 1949 in *Commissioner* v. *Wodehouse,* are urged as presenting special considerations for this Court to grant the petition for review.

Respectfully submitted,

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